EXHIBIT 2a

NO. A147027

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ARNOLD LEONG,
Plaintiff-Respondent,

vs.

WARREN HAVENS,
Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from Superior Court of the State of California, County of Alameda
Case No. 2002-070640
The Honorable Frank Roesch

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CERTIFICATE OF INTERESTED ENTITIES

Pursuant to California Rule of Court 8.208 appellant Warren Havens discloses the following interested persons or entities:

Warren Havens

Arnold Leong

DATED: August 19, 2016

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I. INTRODUCTION

This case involves of a dispute by two individuals over control of companies who held approximately 5,500 FCC licenses.

The case began in 2002 and was ordered to arbitration in 2003 (which plaintiff didn't commence until the end of 2005). The arbitration is presently pending.

In 2015, Plaintiff-Respondent Leong, based on a claim of an alleged oral partnership giving him co-control of the entities, sought a receiver alleging the FCC licenses were in danger of being lost purportedly due an interlocutory ruling by a Federal Communications Commission Administrative Law Judge against Defendant-Appellant Havens ("Havens"); a ruling made in error and presently on appeal.

Without taking any testimony, the court appointed a receiver to immediately take control over the companies Havens had controlled since their creation by him, as well as the FCC licenses and prohibited Havens from participating in the companies, operating the FCC licenses and engaging with the FCC.

This is an appeal from an order appointing a receiver. Reversal is necessary for the following reasons:

- The court below impermissibly used the threat of the receivership to coerce the parties into settlement. This is an unquestioned "abuse of discretion" under California law.
- The evidence before the court below indisputably established there was no imminent risk of harm or danger to the solvent entities placed into receivership, a fact acknowledged by the trial judge.

- The court below allowed Leong, a disgruntled business associate, to improperly use the California courts to frustrate and impede an ongoing arbitration, where nearly the same legal issues offered as grounds for receivership (mismanagement, fraud, FCC penalties) were already being adjudicated by a respected arbitrator. By appointing a receiver at Leong's behest, the court gave Leong a back-door way of getting what he wanted and thwarted the arbitration.
- The grounds for receivership under both Delaware law (which applies by contract between the parties) and California law were not established and under governing Delaware law, the imposition of a receivership on these facts is impermissible.
- Leong's claims of control, and the receivership he obtained based upon those claims are preempted by the federal Communications Act and are subject to the exclusive jurisdiction of the Federal Communications Commission.
- The proceedings below did not provide Havens with the due process to which he is entitled.
- The proceedings below were a taking of property without due process in violation of the Fifth Amendment.
- The appointment of the receiver to take *immediate* control, possession, management and operation of all FCC licenses of the companies prior to seeking any FCC approval violated the FCC's exclusive authority to control the identity of the individuals and entities who operate FCC licenses.

Havens is fully aware that trial judges are given a great deal of discretion when ordering the appointment of a receiver. However, a court's discretionary power here is neither unlimited nor uncontrolled.

> . . . [S]uch power is not entirely uncontrolled and must be exercised with due regard to the facts presented in each particular case. And because the remedy of receivership is so drastic in character, ordinarily, if there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, a court should not take property out of the hands of its owners.

(*Alhambra-Shumway Mines Inc. v. Alhambra Gold Mine Corp*. (1953) 116 Cal.App.2d 869, 873 [254 P.2d 599]; see, also, *Morand v. Superior Court* (1974) 38 Cal.App.3d 347, 350-351 [113 Cal.Rptr. 281], where the Supreme Court declared that the appointment of a receiver in California is a "delicate" judicial function, which must be "exercised sparingly and with caution, and only in an extreme case under such circumstances as demand or require summary relief, and *never in a doubtful case*…." (italics added).) Furthermore, a receiver should not be appointed unless "obviously necessary to the protection of the opposite party…." (See, also, *In re Jamison Steel Corp*., (1958) 158 Cal.App.2d 27, 25-36 [322 P.2d 246] (a court-mandated receivership "should not be invoked unless there is an actual or threatened cessation or diminution of the business.")).

Although most trial court receivership decisions are upheld on appeal, this one must not be. *This is precisely the "doubtful case,"* which should have precluded the appointment of a receiver. It neither demanded nor required the summary relief of a receivership, where Havens' extraordinarily valuable property rights (licenses issued by the FCC) were taken away for

reasons never expressly stated by the court, and *without "due regard for the facts,"* as set forth below.

Furthermore, the existence of exclusive jurisdiction in a federal regulatory agency, the FCC, and preemption of the subject matter of this case, means the trial court not only exceeded the bounds of discretion, it acted in excess of its jurisdiction. Reversal is both warranted and necessary.

II. NATURE OF THE ACTION AND RELIEF SOUGHT

This is a dispute, referred to binding arbitration, regarding the ownership and control of entities which control specialized licenses issued by the Federal Communications Commission. This appeal is from an order appointing a receiver for those entities.

Appellant Havens seeks reversal of the Order Appointing Receiver.

III. STATEMENT OF APPEALABILITY

An order appointing a receiver is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(7). The Order Appointing a Receiver was signed November 16, 2015 and filed November 17, 2015. APP-12. Notice of Appeal was timely filed on December 8, 2015. APP-8

IV. STANDARD OF REVIEW

A trial court's order appointing a receiver is reviewed for abuse of discretion. (*Gold v. Gold Realty Co.* (2003) 114 Cal.App.4th 791, 808 [8 Cal.Rptr.3d 118].) The trial court's choice of law decisions are reviewed *de novo*. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 257 [15 Cal.Rptr.3d 244].)

V. PROCEDURAL HISTORY

This action was filed October 31, 2002 by Arnold Leong. APP-70. On October 20, 2003 the trial court entered an order compelling the parties to arbitrate their disputes. APP-83. Two years later, on November 15, 2005, plaintiff Leong instituted arbitration before the American Arbitration Association. The hearing of that arbitration was in progress when the trial court appointed the Receiver. APP-2708, 2882.

On May 19, 2015 Leong filed an *ex parte* motion to appoint a receiver for Verde Systems LLC, Telesaurus GB LLC, Environmentel LLC, Environmentel 2 LLC, Intelligent Transportation and Monitoring Wireless LLC, Atlis, LLC, V2G LLC, Skybridge Spectrum Foundation and any FCC licenses held or controlled by Warren Havens as an individual.[1] APP-S-1.[2] Leong renewed that motion on July 7, 2015. APP-26. On August 11, 2015, at the hearing on Leong's motion to appoint a receiver, the Court stated its intention to grant that motion, but stated that it would wait until October 5 before actually executing the order. APP-2688.

On November 16, 2015, the Court granted the motion to appoint a receiver, appointing Susan Uecker as receiver. APP-12. Notice of Appeal was filed December 12, 2015. APP-8.

VI. PERTINENT FACTS

Hundreds of millions of dollars of property rights were taken away from Havens, without any findings of fact made by the court below.

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[1] In fact at the time, Havens held no licenses in his individual capacity.

[2] "APP-S" refers to those documents sealed by the trial court and filed under seal in paper form in this court.

However, for the purpose of this appeal, the following facts should be undisputed:

A. The Underlying Action And Arbitration

Warren Havens and Arnold Leong are, on paper, members of two limited liability companies, Telesaurus GB LLC and Verde Systems LLC.[3] A dispute arose, and Leong sued Havens for a number of claims arising from those LLC's. The court below enforced a contractual arbitration clause by sending the dispute to arbitration. Due to the incapacity and death of prior arbitrators, as well as discovery disputes, the arbitration has still not been completed. The arbitration is still proceeding, however, with hearings and discovery taking place until it was stopped as a practical consequence of the receivership order.[4]

The principal assets of Telesaurus and Verde are wireless licenses issued by the Federal Communications Commission. These licenses are in bands used for location dependent industrial communication, such as positive train control, smart grid systems and similar emerging technologies.

B. The Sippel Order

1. Leong's Contentions

Notwithstanding the ongoing arbitration, on May 19, 2015, Leong filed an *ex parte* motion asking the trial court to appoint a receiver to take control of every company controlled by Havens, not just the two in which Leong then claimed member status.

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[3] The actual nature of the interest, if any, held by Leong, is in dispute.

[4] APP-2882 at ¶ 2.

According to Leong's "emergency" motion, as well as his later declarations to the court, an Order issued by an Administrative Law Judge in Washington, D.C. (the "Sippel Order") on April 22, 2015, necessitated the immediate appointment of a receiver, because it was going to "imminently" trigger the loss of appellee's valuable property rights – his claimed interests in the FCC licenses and the companies holding them. Leong expressly told the court there is a "significant risk of imminent harm if a receiver is not appointed immediately."[5]

Weeks later, after Leong had prepared and filed a second amended motion seeking a receivership, he again argued that a receiver needed to be appointed immediately because, ipso facto, the Sippel Order would cause the FCC to issue a Hearing Designation Order ("HDO"), which would essentially put the partnership parties out of business, thus inevitably imperiling his property[6]:

> …the reason we filed our receivership motion is HDO could issue any moment from the FCC, and that could put these – the businesses, the entities that hold these licenses essentially out of business.

[5] Plaintiff's Ex Parte Application Seeking a Receiver, p. 5 (APP-S5). He further alleged that Havens had been "grossly incompetent in managing the day-to-day operation of the Havens/Leong entities." Secondarily, he sought a receiver on the basis of Code of Civil Procedure section 1281.8, subdivision (b), which provides that a receiver may be appointed on the application of a party to an arbitration agreement on the ground that a future arbitration award may be rendered ineffectual without the appointment of a receiver.

[6] RT: Transcript of Hearing Held June 29, 2015, p. 8.

They can't sell, transfer or lease at the moment the HDO is issued."[7]

2. The Sippel Order Itself

Havens was a party to an FCC administrative proceeding, pending before FCC ALJ Richard Sippel. After lengthy and vigorously argued hearings, on April 22, 2015, the ALJ issued an order[8] whereby:

- He "certified" to the FCC that because lawyers for the Havens entities filed a summary judgment motion, allegedly contrary to a prior order (and because of Havens' demeanor/activities in the proceedings[9]), the FCC should consider the "character qualifications" of Mr. Havens and the entities to hold certain broadband licenses (paragraphs 23 and 25); and
- He excluded Mr. Havens and the Havens entities from any further participation in the proceeding" (paragraphs 24 and 26).

3. After The Sippel Order Was Issued

Following the issuance of the Sippel Order, Havens' Washington lawyers immediately asked ALJ Sippel to reconsider his ruling, and also filed an interlocutory appeal to the FCC.[10] The motion for reconsideration,

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[7] RT: Transcript of Hearing Held June 29, 2015, p. 8.

[8] APP-89: Memorandum Opinion and Decision dated April 15, 2015.

[9] NB: Although Leong has been unhappy with Havens' business dealings with him, these were not the primary basis of his demand for a receiver. See Transcript of Hearing Held June 29, 2015, p. 8: "The reason we filed our receivership motion" was the HDO. (*Id.*)

[10] Frix Declaration, APP-1646. A supplemental brief in support of the appeal of the Sippel Order was submitted to the FCC after the

appeal and supplement were based in part on the fact that Havens had not disobeyed the ALJ's order, which triggered the ALJ's certification of Havens' qualifications to the FCC. To prove this, they provided both Judge Sippel and the FCC with a transcript from an earlier hearing in which the judge had permitted the filing of such a motion.[11]

Of nearly equal importance, Havens and the entities also explained that there is no statutory or regulatory authority for an order certifying a character referral based upon "patterns of egregious behavior" at hearings.[12]

4. The Sippel Order Was and is Insignificant.

The risk to the entities posited by Leong is the revocation of their licenses by the FCC. That revocation can come only after a contested hearing before the full commission. 47 U.S.C. § 312; 5 U.S.C. §§ 554, 558. The standard that must be met for revocation is clear and convincing evidence. *Sea Island Broadcasting Corp. of S.C. v. FCC* (D.C. Cir. 1980) 627 F.2d 240, 244.

Judge Sippel's interlocutory order simply asked the full commission to decide whether to institute an investigation into the character of Havens and the Havens controlled entities.[13] Even if it were to reject Havens' appeal, the commission would also have to decide to open an investigation and eventually whether to issue an Order to Show Cause. 47 C.F.R. § 1.91.

August 11, 2015 hearing (thus, it is not in the record here, although it was before the Superior Court in connection with other motions).

[11] APP-1653 at ¶ 15.

[12] APP-1506-07.

[13] APP-89.

That may eventually result in a Hearing Designation Order. 47 C.F.R. § 1.221.

Furthermore, despite the laundry list of alleged wrongs, only one alleged wrong would, under the applicable regulatory regime, support issuance of a Hearing Designation Order. That was the filing of the allegedly unauthorized motion for summary judgment, which as the record before the FCC shows, was authorized by the ALJ's prior statements on the record. 47 C.F.R. § 1.251(f)(3); APP-1653 at ¶ 15.

Thus, the Sippel Order is but the first of many steps that must occur before any of the entities could have their FCC licenses revoked. The one thing it did not create was any imminent risk of harm.

C. The Trial Court's Misapprehension Of The Court-Ordered Arbitration

In both the complaint initially sent to the arbitrator *and* his second amended complaint in 2015, Leong sought monetary damages from Havens for breach of contract, fraud, breach of fiduciary duty, and asked for an accounting and dissolution of the LLCs.[14] These were the disputes and issues the arbitrator was tasked by California law to resolve, and which the trial court was barred from disturbing. Code Civ. Proc. § 1281.4.

A few weeks before the August 2015 receivership hearing, the trial court admitted that it was "not entirely sure what the arbitration was all about."[15] Several days after the court took away Havens' property and gave it to the receiver, the court admitted that: "I thought that the underlying arbitration was – perhaps it's an oversimplified version, but nothing more

[14] APP-70 and APP-1443.

[15] RT Transcript of Hearing Held June 29, 2015, pp. 9-10.

than a dissolution of a partnership."[16] He was clearly wrong about this. Leong's claim for "dissolution" amounted to only 5% of his second amended complaint. In any event, the court also declared (when Havens' counsel contended that the receivership would further delay the arbitration), "I don't care what happens in the arbitration."[17] The court went on to state:

> I don't look at any pleadings. I get enough paperwork here to more than satisfy my desires to read paperwork related to this case;[18]
>
> I don't know exactly what's the arbitration law.[19]

D. The Court Knew it Had a Preemption Problem the day it Decided to Enter the Receivership Order.

On August 11, 2015, counsel for the entities advised the court that ordering a receiver to manage and operate the FCC licenses was pre-empted under federal law.

> There are issues here of preemption here relating to change of control. You know, that is just a matter of statutorily within the jurisdiction of the FCC.
>
> There ís a question in terms of whether a receivership that purports to change control would be preempted by 47 U.S.C. Section 3d 310(d) . We think it would.[20]

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[16] RT Transcript of Hearing Held November 25, 2015, p. 32

[17] RT Transcript of Hearing Held November 17, 2015, p. 5.

[18] RT Transcript of Hearing Held November 25, 2015, p. 33.

[19] (*Id.*)

[20] RT Transcript of Hearing Held August 11, 2015 25:17-23.

E. The Receivership Order Required the Receiver to Immediately Manage the Property including the FCC Licenses and Enjoined Havens from Interfering with the Receiver or Communicating the FCC regarding the FCC Licenses.

Paragraph 7 a. of the Receivership Order stated the Receiver "shall take possession of and manage the property."[21]

Paragraph 14 a. stated the Receiver "shall operate the property."

Paragraph 14 c. stated the Receiver "may do all the things, and incur the risks and obligations, ordinarily done or incurred by owners, managers, and operators of businesses and property similar to that possessed by the receiver;"

Attachment 1 of the Receivership Order stated in relevant part:

> As defined in the Order Appointing Receiver After Hearing and Preliminary Injunction (the "Order"), the appointed receiver shall take control and possession of all property and assets of Verde Systems LLC; Telesaurus GB LLC; Environmentel LLC; Environmentel 2 LLC; Intelligent Transportation and Monitoring Wireless LLC; Skybridge Spectrum Foundation; Atlis, LLC; V2G LLC; as well as all FCC licenses owned or controlled by Warren Havens as an individual (all together, the "Receivership Entities"), including but not limited to those described in this attachment.[22]

[21] APP-12.

[22] APP-17.

Subsequent to taking control and managing the FCC licenses, the Receivership Order stated at Attachment 27:[23]

> 1. As soon as possible, at her discretion, the Receiver shall execute and file with the Federal Communications Commission (the "FCC") all notices, applications, reports or other documentation necessary to establish the Receiver's control over all FCC authorizations, permits, or licenses (identified in Tab 1 to Attachment 1 and collectively referred to as the "FCC Licenses") and to, at her discretion, take such other actions with respect to the FCC as may be necessary or appropriate; including, without limitation, the filing of the necessary forms to assign the FCC Licenses from the Receivership Entities (as defined in Attachment 1) to the Receiver (the "FCC Assignment Application") and, in connection therewith, signing such FCC Assignment Application on behalf of the Receivership entities.
>
> 2. Also as soon as possible, the Receiver shall, at her discretion, intervene in ongoing FCC hearings or other proceedings, if any, related to the Receivership Entities.
>
> 3. The Receiver shall immediately acquire from the Receivership Entities (specifically Warren Havens) and all of their agents or officers, all keys relating to the Estate, and may change any and all locks on the Estate, subject to a prohibition on interference with Mr. Havens' use and occupancy of real property not leased to any of the Receivership Entities, and shall acquire all passwords, designators, identification numbers, and other information necessary to access the

[23] APP-40.

> FCC's computerized licensing and reporting systems in connection with the transfer of control to the Receiver of the FCC Licenses held by the Receivership Entities; including, without limitation, all federal registration numbers, ULS, CDBS and IBFS passwords and account numbers (if the Receivership Entities will not provide this information immediately upon demand by the Receiver, the Federal Communications Commission is hereby authorized to provide the information directly to the Receiver, and the Court requests that it do so as soon as possible).

Section 28 of the Receivership Order restrained Havens from:

> d. (3) interfering in any manner with the discharge of the receiver's duties under this order;"; "(5) doing any act that will impair the preservation of the property or plaintiffs interest in the property."; "e. e. Other (specify):
>
> 6. Interfering in any way with the assignment of the FCC Licenses (as defined in Attachment 1) to the Receiver.
>
> 7. Interfering in any way with the substitution of the Receiver as the individual responsible for the management of the FCC Licenses and Receivership Entities.
>
> 8. Commencing, prosecuting, continuing to enforce, or enforcing any suit or proceeding in the name of the Receivership Entities (as defined in Attachment 1), or otherwise acting on behalf of the Receivership Entities.
>
> 9. Communicating with the FCC regarding the FCC Licenses or the Receivership Entities."

VII. LEGAL ARGUMENTS

A. Choice of Law

1. The Parties Contracted for Delaware Law.

The Limited Liability Company agreements of Telesaurus and Verde provide for the exclusive applicability of Delaware law:

> This Agreement and any and *all disputes*, controversies, claims or differences ("Disputes") arising out of, or relating to, or *having any connection with this Agreement* (including any question relating to its existence, validity, interpretation, performance, or termination) *shall (a) be governed by and construed in accordance with the Act and other laws of the State of Delaware* applicable to contracts made or to be performed entirely within such state and *without giving effect to any choice of law or similar principles that would lead to the selection of the law of another jurisdiction* and (b) be referred to and finally resolved by arbitration conducted in accordance with Section 9.2.[24] [Emphasis added]

Thus, the contracts at issue, provided for both arbitration and the *broad application of Delaware law* to any disputes between Havens and Leong. Havens advised the court that Delaware law "governed" the dispute, cited dispositive Delaware cases, and directed the court to the contract containing the broad choice of law clause.[25] Leong sought a receiver under both Delaware and California law.

[24] APP-786 (sect. 9.1) and APP-817 (sect. 9.1).

[25] See APP-1496-99.

Nonetheless, as evidenced by the court's use of California's judicial council receivership form,[26] and its request that the parties use this California judicial form,[27] it is unquestionable that the court used California law – not Delaware law – as the basis for its receivership order. This was clear error, which must be reviewed *de novo* as a matter of law by the appellate court. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 257 [15 Cal.Rptr.3d 244].)

2. Broad, All-Encompassing Choice of Law Clauses, Such as Those Here, Require The Application of Delaware Procedural Law.

The general rule is California applies its own procedural law where the substantive law of another state governs *unless* the choice of law provision mandates the application of the procedural law of another jurisdiction. (*Judge v. Nijjar Realty Inc.* (2014) 232 Cal.App.4th 619, 629 [181 Cal.Rptr.3d 622].)

But, the Havens-Leong choice of law provision was neither basic, nor generic. It unambiguously stated that their disputes must be "governed" by Delaware law. The use of this language was not accidental. Under California choice of law principles, the phrase "governed by" signifies "a relationship of absolute direction, control and restraint…." It "reflects the parties' clear contemplation is to be completely and absolutely controlled" by the designated state's law. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1445-1446 [140 Cal.Rptr.3d 38], citing and following *Nedlloyd Lines BV v. Superior Court* (1992) 3 Cal.4th 459, 469

[26] APP-12.

[27] RT: Transcript of Hearing Held May 26, 2015, pp. 41-42.

[11 Cal.Rptr.2d 330].) Furthermore, in *Mount Diablo Medical Center v. Health Net of California* (2002) 101 Cal.App.4th 711, 722 [124 Cal.Rptr.2d 607] choice of law language similar to that in the Hayes-Leong agreement was described as ""broad, unqualified and all-encompassing," sufficient to invoke a state's procedural arbitration rules, as well as its substantive law. Here, of course, Delaware law provides a comprehensive set of both substantive and procedural protections to entities organized there.

Hambrecht & Quist Venture Partners v. American Medical Intl. Inc. (1996) 38 Cal.App.4th 1532, 1542 [46 Cal.Rptr.2d 33] is the seminal case for construing a broad choice of law clause to include a foreign state's procedural rules, as well as its substantive law. There, the court rejected plaintiff's invitation to read the expansive "choice of law provision as if it incorporated *only* the substantive law of Delaware, *i.e.*, excluded Delaware procedural law." (*Id.*, italics added.) Instead where (as in this case) a choice of law clause used "unqualified language" to incorporate a given state's "laws", it was proper to apply that law's procedural statute of limitations, as well. (*Id.*)[28] *Hambrecht's* principle was further developed by a California court of appeals in *Hughes Electronics*, *supra*, 120 Cal.App.4th at p. 256, where a broad choice of law clause was expansively construed to include the state's procedural "borrowing" statute, as well as its substantive law. The court there declared: "We hold that, where parties to a valid and enforceable contractual choice of law provision make an unqualified choice to govern the resolution of their disputes by the 'laws' of a foreign jurisdiction, a trial

[28] In *Hambrecht*, *supra*, 38 Cal.App.4th at p. 1546, so long as one of the parties to the agreement is incorporated in a state, that state's laws may properly be used for choice of law purposes.

court may not choose to enforce some but not all of the applicable laws of that jurisdiction." (*Id.*) Furthermore, "[b]y choosing to be bound by New York "law," the parties agreed to be bound by the entire body of that state's laws, including its borrowing statute." (*Id.* at p. 257). The "borrowing statute" was contained in that state's "civil practice law and rules." (*Id.* at pp. 261-262) It is reasonable to infer that parties who include a broad choice of law provision in their contract, selecting a jurisdiction known for its corporate law, intended that *all* the rules of the jurisdiction will apply to their case.

B. Because The Court Admittedly Used Its Receivership Order As A Tool To Coerce Settlement, The Receivership Order Must Be Vacated

It is perhaps understandable that the busy court below was testy and upset with the litigants. It was vocally disturbed by the duration of the parties' arbitration,[29] and clearly wanted them to settle the case as quickly as possible. However, using a judicial order to coerce settlement is legally impermissible and requires the vacation of the court's receivership order. This type of judicial settlement coercion is, *ipso facto*, an abuse of discretion.

[29] RT Transcript of Hearing Held June 29, 2015, at p. 7 [this case "has to be the poster child for reasons why it's a bad idea to take cases to arbitration."]; Transcript of Hearing Held September 22, 2015 at p. 6; Transcript of Hearing Held November 17, 2015, p. 5 ["I don't care what happens in the arbitration. The fact that the arbitration may be postponed until doomsday is just on the parties"].

1. The Judicial *Quid Pro Quo*: If You Settle, There Will Be No Receiver

The court first granted plaintiff Leong's motion for the appointment of a receiver on August 11, 2015.[30] It then surprisingly announced that what Leong described as an "emergency" petition necessitated by "imminent" harm to his property[31] would not be issued (*i.e.*, come into effect) until October 5, 2015[32] (more than six weeks later) unless the arbitrator ruled in the interim or the parties "agree to do something differently."[33] All parties (including appellee Leong) understood the court to mean that the draconian receivership order would not be issued *unless the parties settled, or an arbitral decision was received*. Leong's counsel admitted at a hearing between the date the court announced its intentions and the date the order was entered that only settlement by the parties would cancel the receivership order:

> We believe your August 11th order was very clear. The motion for receivership was granted, the order will issue October 5th, *unless we have a settlement*, or unless the arbitration is concluded.[34]

[30] RT Transcript of Hearing Held August 11, 2015, p. 27.

[31] RT Transcript of Hearing Held July 20, 2015, p. 5; Transcript of Hearing Held June 29, 2015, p. 8.

[32] RT Transcript of Hearing Held August 11, 2015, at 27. In fact, the court did not issue its receivership order in Leong's favor until November 16, 2015, over three months, or 12 weeks, after granting Leong's petition.

[33] RT Transcript of Hearing Held August 11, 2015, p. 27.

[34] RT Transcript of Hearing Held September 22, 2015, p. 5.

(Italics added.) Leong's counsel contemporaneously advised the court that the "arbitration cannot possibly be concluded by October 5th." Therefore, he (like Havens) was fully aware that settlement was the only option granted by the court to avoid the appointment of a receiver.[35]

With remarkable candor, the court stated *on the record* that the unusual length of time between his "emergency" order and its final issuance six weeks later was to compel the parties to settle: "What am I supposed to do? I try to get you people to settle."[36]

2. It Is Legally Impermissible To Compel The Parties To Settle Using Judicial Process

Unquestionably, a court has the right to order parties to a settlement conference. It may not, however, use its judicial power (such as a receivership order) to coerce the parties into settlement. (See, *e.g.*, *Kothe v. Smith* (2d Cir. 1985) 771 F.2d 667, 669 (while "the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion."); *Goss Graphics Systems Inc. v. DEV Industries, Inc*. (7th Cir. 2001) 267 F.3d 624, 627-628 (even the trial judge's "annoyance at the parties failure to settle was not a valid ground" for a judicial act.); *In re NLO, Inc.* (6th Cir. 1993) 5 F.3d 154, 157 (courts should never work to coerce or compel a litigant to make a settlement).)

This is the law in California, as well. In *Barrientos v. City of Los Angeles* (1994) 30 Cal.App.4th 63, 71-72 [35 Cal.Rptr.2d 520], the court held that where a judge's "underlying motive" for a judicial order is improper – *i.e.*, "to punish counsel for failing to settle the case," the order is

[35] RT Transcript of Hearing Held September 22, 2015, p. 5.

[36] RT Transcript of Hearing Held October 1, 2015, p. 8.

an abuse of discretion, and must be reversed – in *Barrientos*, the litigant was told he could avoid an order of sanctions if he settled the case. This judicial stratagem was evidenced (as here) by transcripts showing the court's motives, which gave defendant a way of avoiding the effect of the order by settlement. (See, also, *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1422 [29 Cal.Rptr.2d 741] (holding that a court may not use judicial process to compel litigants to settle a case); see also *Kamaunu v. Kaaea* (Hawaii App. 2002) 56 P.3d 734, 743 (courts may not use their judicial power, by pressure tactics to coerce settlement, "whether directly or obliquely.")). Unquestionably, it is an abuse of the judicial system for a judge to issue an order "in an effort to coerce a settlement." (*Embry v. Turner* (Ky. App. 2006) 185 S.W.3d 209, 217-218.)

Given these authorities, the "unusual" delay between the initial receivership order (premised on "imminent" harm) and its issuance, and the court's own remarks, the court's use of the order to "try to get you to settle," was both improper and an abuse of discretion.

C. Respondent Knowingly Misled the Trial Court About "The Imminent Harm" His Property Would Sustain if a Receiver Was Not Appointed "Immediately." No Emergency or Imminent Harm Existed as a Matter of Fact and Law When the Receivership Order was Issued.

Leong repeatedly "cried wolf" about the "emergency" need for a receiver, notwithstanding that *months* passed between his May emergency motion and the ultimate issuance of the November receivership order. Allegedly, the Sippel Order necessitated the immediate appointment of a receiver, because it was going to "imminently" trigger the loss of

respondent's valuable alleged property rights.[37] Leong contended that there is a "significant risk of imminent harm if a receiver is not appointed immediately."[38] Plaintiff also alleged that the Havens-Leong entities (and licenses) "are in imminent danger of insolvency."[39] This was not true in May 2015, as a matter of law. It is not true now.

1. The Chronology of Events: No "Imminent Harm" to Entity Property Existed as a Matter of Fact.

On May 19, 2015 (substantially more than a year ago), Leong first brought his "emergency" *ex parte* application to appoint a receiver, pursuant to Code of Civil Procedure section 564, subdivision (b)(9), which under certain circumstances allows the appointment of a receiver "where necessary to preserve the property or rights of any party."[40] He vigorously argued that his property was in "imminent harm" of being lost, and needed the court's protection.[41]

Leong contended that the Sippel Order would quickly trigger the loss of "all commercial interest in their valuable FCC licenses."[42] He argued it

[37] As noted previously, Havens disputes that Leong has any property rights in the assets of the receivership entities. That issue is before the arbitrator.

[38] APP-S5.

[39] APP-S76 line 27.

[40] APP-S6.

[41] APP-S74 line 9.

[42] *Id.*

would cause the FCC to issue a HDO, which would essentially put the partnership parties out of business, thus inevitably imperiling his property.[43]

> …the reason we filed our receivership motion is HDO could issue any moment from the FCC, and that could put these---the businesses, the entities that hold these licenses essentially out of business. They can't sell, transfer or lease at the moment the HDO is issued."[44]

Leong continued to cry wolf for months. As of the November 17, 2015 issuance date, no HDO had issued. No emergency existed. No imminent harm to Leong's purported property existed – six long months after Leong's claim of necessity.

According to Webster's New Unabridged Dictionary Universal (2d edition), page 909, "imminent" means "likely to happen without delay." Leong claimed that the Sippel Order presented an "imminent threat" to his purported property. However, as the United States Supreme Court has explained in the environmental context, '[a]n endangerment can only be 'imminent' if it threatens to occur immediately." (*Meghrig v. KFC Western, Inc*. (1996) 516 U.S. 479, 485 [116 S.Ct. 1251, 134 L.Ed.2d 121].) That certainly was not the case here. It is axiomatic that merely conclusory allegations as to the "imminency of harm" will not trigger a right to the

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[43] He further alleged that Havens had been "grossly incompetent in managing the day-to-day operation of the Havens'-Leong entities." Secondarily, he sought a receiver on the basis of Code of Civil Procedure section 1281.8, subdivision (b), which provides that a receiver may be appointed on the application of a party to an arbitration agreement on the ground that a future arbitration award may be rendered ineffectual without the appointment of a receiver.

[44] RT Transcript of Hearing Held June 29, 2015, p. 8.

receivership of a purportedly foundering business. There must be concrete evidence that a receivership must be immediately granted to prevent irreparable harm to the corporation and its shareholders. (See, *e.g.*, *A.G. Col Co. v. Superior Court* (1925) 196 Cal. 604, 613 [238 P. 926].)

The court unquestionably understood that there was likely no imminent harm to Leong's property on June 29, 2015, when it actually challenged Leong's counsel about the imminence of the HDO: "You told me a month ago it was going to happen momentarily…. It might not happen for a year."[45] Almost five months later, the court abused its discretion by granting a receivership petition based upon a threat of "imminent" harm, when it was *factually* clear the alleged threat was unlikely to exist.

Leong sought a receiver under Code of Civil Procedure section 564, subdivision (b)(8) to protect his alleged property. However, this can only be done "where necessary to preserve property or rights of a party." Code of Civil Procedure § 564(b)(9). As Witkin points out, the latter section "sharply restricted" the broad language of section 564, subdivision (b)(8). (Witkin, 6 Cal. Proc., Provisional Remedies (5th ed. 2008)§ 424, at p. 362.) As the facts above make clear, there was no necessity to preserve Leong's property by means of a receivership. To do so, was an abuse of discretion.

[45] RT Transcript of Hearing Held June 29, 2015, p. 8.

2. Under Federal Regulations and Statutes, There was No Imminent Risk of Harm to the Licenses as a Matter of Law.

a. Leong's grossly misleading contentions that FCC law required the immediate appointment of a receiver by the trial court.

According to Leong, "Havens' inexcusable behavior has placed these FCC licenses at direct and significant risk of immediate cancellation by the FCC," and suggested that the Sippel Order somehow placed the licenses in "immediate jeopardy."[46] This is patently untrue.[47] The few cases cited by Leong were inapposite and misstated. Under the Jefferson Radio Doctrine, broadcast licensees whose licenses have *been designated for a revocation hearing* on basic qualification issues are generally not allowed to transfer control of those licenses until the Commission has determined that the licensee is qualified to retain its broadcast authorization. (*Jefferson Radio Co. v. FCC* (D.C. Cir. 1964) 340 F.2d 781, 783.) However, the Sippel Order was merely an interim recommendation. No revocation hearing (or the issuance of an HDO) could take place for a very long time.

b. Due process concerns and FCC statutes and regulations negated the existence of an "imminent threat."

First of all, it must be emphasized that the Sippel Order was not an ALJ order stating the Havens' licenses *should* be revoked or financially penalized. (See, *e.g., Kay v. FCC* (D. D.C. 1997) 976 F.Supp. 23, fn. 2.) Nor was it a determination by him that Havens was in some way unfit to

[46] APP-S58 at line 9.

[47] APP-1651-53, ¶¶ 8 to 15.

hold an FCC license. Instead, it was merely a certification to the FCC, asking them to *explore* whether Havens, et al., were qualified to hold these licenses. The Sippel Order, paragraph 23,[48] stated the ALJ:

> …believes…[the conduct of Havens et al] warrant a separate proceeding in which several issues as to the character qualifications of Mr. Havens and the Havens companies to hold Commission licenses are examined."

Under 47 C.F.R. § 1.251, subdivision (f), this "certification" was only an invitation to the FCC to review ALJ Sippel's suggestion. Given the existence of the hearing transcript language allowing Havens to file the disputed summary judgment motion, it is unlikely that any further action by the FCC would take place.

Even if some fault on Havens' part were discerned by the FCC, the scheduling of an evidentiary hearing as to Havens' purported misfeasance (with the issuance of an HDO) was but one of *several* possible consequences – and the least likely –the FCC commissioners could choose. The commissioners could ignore Judge Sippel's certification and not take any action. Alternatively the commissioners could admonish Havens, or they could impose a monetary fine. (See 47 C.F.R. §1.80.) Lastly, they could impose "conduct remedies" similar to the one that defense counsel recommended to the court below as "a less onerous remedy" than a receivership – *i.e.*, have Havens' relinquish his *pro se* rights in front of the ALJ.[49] This process could take a very long time. Only after all of these

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[48] APP-101.

[49] RT Transcript of Hearing, 8/11/2015 pp. 16-17, and APP-1497 lines 4-5; APP-649.

options are considered and rejected, would the FCC *consider* its most severe punishment, revocation of the licenses.[50]

Even then, there will still be a months-long delay after that. First of all, the FCC is required to comply with a number of due process procedures[51] intended to protect the licensee and the broader public interest.[52] (See also 47 U.S.C. § 312(c).) Once it seriously contemplates holding a revocation hearing, it must first issue an order to "show cause" why a hearing should occur. The licensee then has at least 30 days to respond to the order to show cause. (47 U.S.C. §3 12(c), 47 C.F.R. § 1.1.(b).) The FCC must next review and consider the licensee's response to the show case order. Discovery may be ordered. Only after *all* of this, might a hearing be scheduled and an allegedly "catastrophic" HDO ordered.

As of November 16, 2015, none of these preliminary steps had been taken by the FCC. There had been no FCC review, no consideration or decision concerning alternative penalties, no order to show case, no discovery, and no responsive pleading by Havens. As a matter of law, therefore, there was no immediate or imminent threat to Havens' property. There will likely never be one.

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[50] APP-474 at ¶¶ 18-19.

[51] This is hardly surprising. As is shown in this case, FCC licenses are often worth hundreds of millions of dollars, and require very stringent and careful due process protections. APP-474 at ¶¶ 18-19. Havens presented below evidence of the circumstances in which the FCC had revoked licenses. Needless to say, all were substantially different from the circumstances of this case. APP-1506-07.

[52] APP-474 at ¶¶ 18-19.

Leong knew this. As an experienced and long-time FCC participant[53]– he has held interests in many licenses other than those he claims in this action – he knew that in the proceeding that prompted the Sippel Order, another HDO had been threatened against a third party. As of July 2015 (four years later), it still had not resulted in any discipline or license endangerment.[54]

More pertinently, the trial court had evidence in which experts for both Leong and havens agreed that it was "unprecedented" for any FCC license to be revoked because of a party's participation in litigation before the FCC against another party.[55]

3. Under Delaware law, a receiver should not be appointed unless there is a clear "showing of imminent danger of great loss." Therefore, the trial court should not have applied California's apparently laxer standard

As evidenced above, there was no factual or legal emergency here. There was no "imminent" danger of harm to Leong's purported property interests.

a. Procedurally, Delaware law is much more favorably to Havens

As Leong admits, Delaware law "governs this action."[56] Delaware provides greater "due process" rights to defendants in receivership cases

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[53] APP-530 ¶ 2.

[54] APP-475 ¶ 20.

[55] APP-475 ¶ 21.

[56] APP-1497 (lines 26-27); APP-786 (Sect. 9.1); APP-817 (Sect. 9.1).

than California. Every complaint seeking a receiver must be verified,[57] which did not occur in this case. More pertinently, although petitioner's initial demand for a receiver goes forward in a sort of summary judgment procedure, a receiver will never be appointed if the facts presented at the summary judgment hearing are (as in our case) vigorously disputed and incomplete. *Banet et al. v. Fonds de Regulation* (Del. Ch. 2009) 2009 WL 529207, *1, 3-4.[58] Furthermore, at the initial receivership hearing "all evidence offered by the non-moving party is still to be viewed in the light most favorable to the non-moving party." (*Id.* at *3). Where vigorously disputed facts do exist, a trial takes place---with express findings of fact and conclusions of law – before a receiver is appointed. (*Id.*). See *Carlson v. Hallinan* (Del. Ch. 2006) 925 A.2d 506, 544 and *Hall v. John S. Isaacs & Sons Farms Inc*. (Del. Ch. 1960) 163 A.2d 288, 293. This did not happen with regard to Havens, because the trial court never made any findings.

Had Delaware law been applied in this instance, there would have been "no clear showing" of imminent harm to Leong's alleged properties. As such, the application of California law to this receivership was both prejudicial to Havens and error.

[57] Rule 149 of the Rules of Chancery for the State of Delaware: "Every complaint filed for the appointment of a receiver for a corporation shall be verified."

[58] The Delaware Supreme Court and the Court of Chancery routinely cite cases published only in Westlaw, an accepted practice in Delaware. See, *Seneca Investments v. Tierney* (Del. Ch. 2008) 970 A.2d 259 n. 13, *et seq*.

b. No exigency or "imminent harm" existed under Delaware law

Whether a company is solvent or insolvent, a Delaware court must appoint a receiver with "great restraint." The court "will only exercise its power to appoint a receiver upon a clear showing of fraud, mismanagement or extreme circumstance *causing imminent danger of great loss which cannot otherwise be prevented***.**" *Banet, supra,* at *4 [emphasis added], which explained that this is a "very high standard," and *VTB Bank v. Navitron Projects Corp.* (Del. Ch. 2014) 2014 WL 1691250, *5. See, also, *Drob v. Nat'l Mem. Park*, (Del. Ch. 1945) 41 A.2d 589 [a receiver should only be appointed in instances of "great exigency"].

D. The Appointment of a Receiver for Solvent and Extremely Valuable Companies is Subject To More Stringent Standards Than Ordinary Receivership Petitions, and Even Greater Restrictions Under Delaware law.

1. California law applies more stringent standards to solvent entities than to insolvent companies..

The receivership rules set forth in *Morand, supra,* 28 Cal.App.3d at pp. 350-351, and *Alhambra-Shumway Mines, supra,* 116 Cal.App.2d at p. 873, govern most ordinary petitions to appoint a receiver in California. But this is not an "ordinary" case. The lower court appointed a receiver over a group of solvent, very complex companies – which even according to plaintiff and his own experts – had increased in value from about $2 million[59] *to at least $743,000,000*."[60] This was not a situation where the

[59] Leong states in 1998-2000, he provided more than $1,120,000 to the alleged partnership. APP-756 ¶2.

[60] APP-868.

companies were insolvent or incapable of paying their debts, taxes were unpaid and the court had to step in to prevent their complete collapse. The governing rule in this instance is that judicial discretion to appoint a receiver over a solvent company is much more narrow than in non-insolvency cases. (Fletcher, *Cyclopedia of the Law of Corporations* (2015) § 7697, Propriety of Appointment [of Receivers] ("While a receiver may be appointed for a solvent corporation in the proper circumstances, *these cautionary rules should be applied even more stringently in the case of a solvent corporation*.") (Italics added).)

California law is to the same effect. In *Starbird v. Lane* (1962) 203 Cal.App.2d 247, 261 [21 Cal.Rptr. 280], the court stated that: "The power to appoint a receiver for a going corporation should be exercised sparingly. It is a drastic remedy and one which should not be invoked unless there is a threatened injury to a corporation of a serious nature." As a result, the *Starbird* court stated that plaintiff's complaint, which contained merely conclusory allegations of injury and damage did not suffice to state a case for a receivership over a solvent, ongoing entity. (*Id.* at p. 257; see, also, *Jamison Steel*, *supra*, 158 Cal.App.2d at pp. 35-36 (receivership over a solvent company should not be invoked unless there is an actual or threatened cessation or diminution of the business)). There was no actual or threatened cessation or diminution here.[61] See also *Rogers v. Smith* (1946) 76 Cal.App.2d 16, 21 [172 P.2d 365].

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[61] Citing to persuasive out-of-state cases, the *Jamison Steel* court warned that: "The idea of insolvency, actual or threatened, is so thoroughly associated in the minds of the public with the appointment of a receiver, that it is readily seen that many of the debtors of the concern would feel themselves absolved from any further obligation to pay. Then, also, we must consider the effect upon the general credit of the corporation of the

At the very least, Havens' greatly increasing value and solvency of his companies ought to have been a "plus factor" against the lower court's decision to appoint a receiver. It was not, and on that grounds alone, an abuse of discretion occurred and Leong's petition for a receiver was improvidently granted.

2. The court's error with regard to the LLCs' purported insolvency

The trial court expressly (and erroneously) based its decision to appoint a receiver on the Havens' companies' failure, over a period of years, to pay Mr. Leong significant dividends or profits.[62] When Havens' counsel argued that there were more restrictive standards for imposing receivers on *solvent* companies, than on *insolvent* ones, the court vociferously interjected that the LLCs had never made a distribution of profits to Mr. Leong, and said:

> "you want to argue to me that these entities are solvent, and so that I shouldn't put in a receiver when, in fact, they never made a distribution in 15 years?"[63]

This is clearly a misapprehension of what it legally means for a company to be insolvent. The court below knew that the value of Mr. Leong's interest in the FCC licenses had increased from $2 million to at

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appointment of a receiver, and I cannot but think it will seriously injure, if not destroy, its credit." *Jamison Steel, supra* at 35-36.

[62] RT Transcript of Hearing Held August 11, 2015, p. 11).

[63] RT Transcript of Hearing Held August 11, 2015, pp. 10-11.

least $350 million in a few short years.[64] It was advised that FCC licenses of this sort must be held for a number of years (as happened here) to maximize their value so they can be ultimately turned into profit-making ventures.[65] Companies that reinvest profits don't pay those profits as dividends or distributions.

Nonetheless, the court persisted in believing that it had the right to order a receiver because the companies controlling the licenses were somehow "not solvent," because (according to the trial judge). Mr. Leong had not received cash distributions for many years.[66] This is not what "solvent" means. As Black's Law Dictionary (10th ed. 2014) p. 1609 explains, solvent is defined as "[H]aving enough money to pay one's debts; capable of paying all legal debts." In California courts, it means (as a matter of law) either having an excess of liabilities over assets or (more preferably) the inability to meet "obligations as they mature in the ordinary course of business." (*California Retail Portfolio Fund GmbH & Co. v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 859-860 [122 Cal.Rptr.3d 614].) Delaware law is approximately the same, but requires greater and clearer proof of insolvency. See *Banet supra* at *4 ["Insolvency is a jurisdictional fact." Either a company's liabilities exceed assets or "there is an inability to pay current obligations in the ordinary course of business. In any event, in order to obtain a receivership, "Proof of insolvency must be clear and convincing and free from doubt." (*Id.*)

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[64] An amount easily derived from Mr. Musey's low end estimate.

[65] RT Transcript of Hearing Held August 11, 2015, p. 15.

[66] RT Transcript of Hearing Held August 11, 2015, p. 11.

Leong produced no evidence that either of these situations existed. To the contrary, he proved the extraordinary value of the companies

a. Delaware law restricts receiverships for solvent entities more vigorously than California.

Leong admitted that he was seeking a receivership against a *solvent* company, and grounded his right to a receiver on a specific Delaware legal principle, that "a Delaware court "has the inherent power to appoint a receiver for a solvent corporation."[67] Citing to *Carlson v. Hallinan*, *supra* at 544, he told the court below that in Delaware, a receiver may be appointed if a corporate party is guilty of fraud or mismanagement or (his emphasis) "extreme circumstances showing imminent danger of great loss that cannot be prevented by other means.[68]" The implication, of course being, that a receivership over a solvent corporation could be imposed under Delaware law in a summary proceeding merely upon allegations of fraud and mismanagement. Leong explicitly stated this in his Reply memorandum at p. 3 (APP-2301). That is, of course, not true. See *Banet v. Fonds de Regulation*, *supra* at 2009 WL 529207,*4 [even if there is some evidence of fraud or mismanagement, there must *also* be an "imminent threat of great loss" before a receiver will be appointed over a solvent corporation] and *Berwald v. Mission Development Co*. (Del 1962) 185 A.2d 480, 482 where the Delaware Supreme Court explained: "The extreme relief of receivership to wind up a solvent going business is rarely granted. To obtain it there must be a showing of *imminent* danger of great loss resulting from fraud or mismanagement" [emphasis supplied]. Thus, Leong affirmatively mislead

[67] *Id.*

[68] APP-2301 lines 3-5.

the court below when he stated that, under Delaware law, when "misconduct or mismanagement is present, the separate criteria of 'imminent risk of great loss' is not required."[69]

In Delaware, appointing a receiver "for a solvent company is a "radical remedy" and should only be taken when the petitioning party has '"plainly shown his entitlement to it." *Seneca Investments LLC v. Tierney Supra* at 265. For a solvent company, there must be a "strong showing" of "*great exigency.*" *Drob v. National Memorial Park* (Del. Ch. 1945) 41 A.2d 589, 597 [emphasis added] and "imminent danger of great loss." *Berwald, supra*, at 482. This was not a situation of "great exigency." There was no "imminent danger of great loss" to Leong's claimed properties as a matter of fact or law. Therefore, under Delaware law, Leong would not have been entitled to the appointment of a receiver.

While the court's mistake was harmful under California law, it was catastrophic under Delaware law. In Delaware, a receivership is improper based upon the alleged threat of insolvency, when the defendant's contractual failure to make certain payments "is due not to inability to pay but to a dispute as to its amount or validity . . . ." (*Velcut v. U.S. Wrench Mfg. Co.* (Del. Ch. 1928) 140 A. 801, 802.) This type of business dispute is exactly what is present here. Under Delaware law, the court's concerns about the Havens' companies' choice to reinvest rather than pay-out profits to a business partner could not have triggered a right to a receiver. See, *e.g.*, *Beal Bank SSB v. Lucks* (Del. Ch. 1998) 1998 WL 778362. Therefore, the trial court's use of California law, rather than Delaware's, was profoundly prejudicial to Havens. As a result, the receivership order must be reversed.

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[69] APP-2306, lines 8-9.

b. Delaware does not allow receiverships on the flimsy "proof" offered here.

Leong purports to seek receivership under 6 Delaware Code, section 18-805.[70] That statute, however, only provides for placing an LLC into receivership when its certificate of formation is being cancelled for purposes of winding down and settling its affairs. (6 Del. C. § 18-805.) Outside of this dissolution context, which the trial court was not empowered to do, Delaware LLCs can only be placed into receivership under traditional Delaware equity principles, under which

> courts have employed the "insolvency plus" standard, under which the moving party must prove that the company is insolvent, plus additional facts that demonstrate that the intervention of a neutral third party is necessary to protect the rights and interests of either the company or the moving parties.

(*Ross Holding and Mgmt. Co. v. Advance Realty Group, LLC,* (Del. Ch. Sept. 2, 2012) 36 Del. J. Corp. L. 805, 2010 WL 3448227, at p. *5.)[71]

But even in that traditional equity context under Delaware law, the standard for imposing a receivership is very "stringent" and "should be applied with scrupulous care" (*Id.* at p. *6 (footnotes omitted).) Furthermore, even where the Plaintiff has "asserted facts that, if true and

[70] Leong also sought a receivership under California law, but also presented the court with Delaware case authorities. APP-2298.

[71] Under the relevant LLC agreements disputes must be arbitrated. The one exception is requests for injunctive relief but, under Sec. 9.4 of the LLC Agreements APP-786 and APP-817 interim relief such as a receivership is *only* available *before* the arbitration commences. The receivership motion is thus jurisdictionally defective.

accurate, would meet this high standard," if "material facts remain in dispute…with respect to [various fact issues], it will be necessary to hold a trial in order to further develop the necessary factual record for a fair assessment of their application," and thus the "Plaintiff['s] motion for appointment of a receiver [must be] denied." (*Id.* at p. *9.)

The trial court was not ruling on an LLC dissolution. Dissolution was merely one remedy sought by Leong *in the Arbitration.* There were substantial disputed issues of fact going to the heart of Plaintiff's claims of ownership interests, the LLC's, purported insolvency and mismanagement (referred to and currently being addressed in the parties' ongoing arbitration), plus the existence of disputed issues of fact as to whether any immediate relief was needed. As a result, under Delaware law a receivership could and should not have be granted without holding a trial, which in this case means until fact-finding is completed in the arbitration where the parties agreed to resolve most of these issues.[72] Moreover, even if

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[72] In Delaware, it is the Court of Chancery (a court of equity) that is responsible for deciding how and when receivers are appointed. There is a two stage receivership process in Delaware. First, plaintiff seeks a receiver by filing a verified complaint (Rule 149, Del. Rules of Chancery), then a motion on the pleadings (akin to a summary judgment procedure), to which defendant is entitled to reply with his own pleading. In that initial process, the chancery court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party. The non-moving party is entitled to the benefit of any inferences that may fairly be drawn from the non-moving party's pleading. *In re Seneca Investments*, supra, at 262, fn. 7. [NB: This is the reverse of California's procedures. See *Patents Process v. Superior Court* (1929) 101 Cal.App. 541, 546 [282 P. 21]].

Next, if there any doubts whatsoever as to disputed facts, the receivership petition goes to a full-blown trial. See *Banet, supra*, *1, 4 and *Ross Holding*

a receivership of some kind were to be ordered, it needed to be narrow in scope than the sweeping, multi-page receivership order issued by the trial court.

Delaware law should have been applied. If it had been, there would have been no receivership. The trial court's order must be reversed.

c. There is no Delaware equivalent to Code of Civil Procedure § 564(b)(9) which gives a court broad discretion to appoint a receiver "where necessary to preserve the property or rights of any party."

Havens assumes (the trial court announced no findings) that the trial court granted a receivership in order to "preserve" Leong's claimed property under Code of Civil Procedure § 564(b)(9). Leong sought relief on this basis.

Leong only perfunctorily referred to any Delaware statutes to support his plea for judicial protection for his alleged property. He cited to 6 Delaware Code sec. 18-805, which permits certain corporate creditors, who can "show good cause" to present an application for appointment of a

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and Management Company v. Advance Realty Group LLC (Del. Ch. 2010) 2010 WL 3448227,*7 ["where the Plaintiffs have alleged facts that, if true, would constitute sufficient grounds for appointing a receiver *pendent lite* but where questions of fact remain in dispute, the appropriate resolution of the Plaintiffs' motion would not be dismissal but a trial on the accuracy of the facts put forward;…[and] because material facts remain in dispute….it will be necessary to hold a trial" before a receiver can be appointed. That second stage of the proceeding, provides for the testimony of witnesses, the admission of evidence etc. See, *e.g.*, *Carlson*, supra, at 521 ["The general rule is that witnesses must be examined fully and specifically as to their knowledge of all material matters in controversy."] In either event, the chancery court must issue findings of fact and conclusions of law to justify the imposition of a receiver. See, for example, *Carlson*, supra, and *Hall v. John S. Isaacs & Sons Farms Inc*. (Del. Ch. 1960) 163 A.2d 288, 293.

receiver; sec. 18-305, which Havens allegedly breached by failing to provide Leong with certain financial information; and section 18-226. These statutory sections do not help Leong because 18-305 only allows a very limited receivership to "cure" the claimed financial information deficiency, *Jagodzinski v. Silicon Valley Innovation Co.* (Del. Ch. 2012) 2012 WL 593613,*3 and 18-805 "allows for the appointment of a receiver only when a limited liability company's certificate of formation has been cancelled." *Ross Holding, supra*, at*5. No one contends that this has happened here.

Leong's demand for a receiver based on the "imminent harm" to his claimed property is seemingly based, therefore, on the Delaware cases he cites: *Carlson*, *supra*, and *Hall*, *supra*, at 250. Both of these cases involved allegedly insolvent corporations and "liquidating receivers. Therefore, the *Hall* court considered 8 Del C. sec. 226, which specifically allows a liquidating receiver for a corporation in dissolution, and almost never be utilized when a company is solvent. (*Id.* at 252-253). The *Hall* court decided (after an evidentiary hearing, with findings and conclusions) that a receiver should not be appointed, and suggested that plaintiff's concern about "no dividends" could be dealt with by a less onerous equitable remedy: an order to the majority shareholders directing them to declare and pay a dividend (*Id.* at 255-256). More importantly, since at least 1982, "custodians" of financially vulnerable and deadlocked companies (formerly their receivers) have "sharply limited" powers. They may only act like managers of the company, and run its affairs. They are specifically prohibited from dissolving the company. *Giuricich v. Emtrol Corp*. (Del. 1982) 449 A.2d 232, 237-240.

Delaware has no statutory provision allowing a receiver to be appointed to "preserve" a business partner's alleged property, by means of a

hearing which grants the receivership based upon plaintiff's allegations, and which are disputed by the non-moving party. The only case which arguably involves roughly similar facts is *Beal Bank SSB v. Lucks, supra*, in which plaintiff sought the appointment of a receiver "to preserve the company's assets and to prevent their transfer to another known entity." The *Beal* court declined to appoint a receiver on a mere "prima facie case of fraud". The receivership remedy could only be granted after a trial on the merits. The mere possibility of harm to the property was not enough. As the court explained, citing to an earlier court opinion: "There must be something more than a possibility of danger and loss to justify the court in exercising the unusual and extraordinary power of appointing a receiver." (*Id*. at *3). A receiver will only be appointed when there is strong and "clear" evidence of immediate harm, not just a "tangled web of factual confusion." (*Id*.) As the court in *Barry v. Full Mold Process Inc.* (Del. Ch. 1975) 1975 WL 1949,*4 explained, even where corporate mismanagement and deadlock are alleged, which "imperil the receipt of income from present licenses", there still must be solid proof of "immediate and irreparable harm" giving rise to this alleged threat. The proof of this "immediate and irreparable harm" must be tested at trial.

In light of these authorities, proper application of Delaware law would have precluded the receivership against Havens and his companies.

E. A Less Onerous Alternative To Receivership Was Offered To The Trial Court And Ignored, Because The Court Erroneously Believed It Had No Power To Issue An Injunction

It is axiomatic that the "drastic" equitable remedy of receivership should not be ordered if "there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, [because] a court

should not take property out of the hands of its owners." (*Alhambra-Shumway Mines, supra*, 116 Cal.App.2d at p. 873; see, also, *City and County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745 [20 Cal.Rptr.2d 256] (a trial court "must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership.").) One such remedy is the issuance of an injunction, under the court's equitable powers. (See, *e.g.*, *Dabney Oil Co. v. Providence Oil Co.* (1913) 22 Cal.App. 233, 239, [133 P. 1155] (court reversed the trial court's order appointing a receiver because an injunction would also have preserved the property at issue).)

Here, Leong was arguing that Havens' continued personal participation in FCC hearings (as castigated in the Sippel Order) would trigger the loss of property allegedly owned by him. As noted above, the Sippel Order standing alone could do no such thing. More pertinently, however, the trial court was repeatedly advised that there were less draconian means of preventing any loss or damage to Leong's purported property interests – most notably, an order forbidding Havens from appearing *pro se* in FCC-related proceedings, thus precluding the type of conduct that irritated ALJ Sippel.[73] The trial court was also advised that this alternative (which is one the FCC, itself, could demand) would likely be acceptable to Havens. However, this alternative remedy was rejected out of hand by the trial court[74]: "I don't believe I have the power to make that kind

[73] RT Transcript of Hearing Held August 11, 2015, pp. 16-17.

[74] RT Transcript of Hearing Held August 11, 2015, pp. 16-17.

of order."[75] The Superior Court most assuredly had this power under traditional equitable principles.[76] By failing to select this less onerous remedy – particularly one, which Havens was likely to accept – was an abuse of discretion.

California courts are courts of equity and have jurisdiction to issue injunctions designed to protect a party's property. (Code Civ. Proc. § 187.) Thus, California courts can enjoin a creditor's execution against debtors' stock. (*Allen v. Pitchess* (1973) 36 Cal.App.3d 321, 328 [111 Cal.Rptr. 658] (landlord's interference with tenants' business activity); *Kinda v. Carpenter*, (2016) 247 Cal.App.4th 1268, 1270-1271 [203 Cal.Rptr.3d 183] (encroachment on someone else's property); *Harrison v. Welch* (2004) 116 Cal.App.4th 1084 [11 Cal.Rptr.3d 92] (enjoin a litigant from continued representation by an attorney, because a conflict exists involving a third party); (*Killian v. Millar* (1991) 228 Cal.App.3d 1601, 1606 [279 Cal.Rptr. 877].)

This is not a case where the trial court would be restraining a litigant from commencing or maintaining litigation in another forum, which (if done at all) must be done with "great restraint." (*Biosense Webster Inc. v. Superior Court*, (2006) 135 Cal.App.4th 827, 837-839 [37 Cal.Rptr.3d 759].) Instead, it is merely placing a *de minimis* condition on a litigant's on-going participation in quasi-judicial proceedings, where he is already represented by counsel. He could not personally appear in the litigation, when he has already by this personal appearance irritated a judicial officer.

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[75] RT Transcript of Hearing Held August 11, 2015, pp. 16-17)

[76] The Arbitrator also had the power to issue injunctions under the AAA rules.

This would serve the same purpose of the receivership statute, to preserve and protect Leong's property. This "conditioning" of a right is also found in "vexatious litigant" cases. Under Code of Civil Procedure § 391.1, a person found to be a "vexatious litigant" may still file suits, and seek judicial relief, *so long as he employs an attorney*. Code of Civil Procedure § 391.7(b). This type of restriction or condition on litigation is both legal and constitutional. (See, *e.g.*, *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 58-59, [61 Cal.Rptr.2d 694] (acknowledging that "no citizen is required to hire a lawyer," but holding that California's vexatious litigant statute did not impede a citizen's right to sue because, *inter alia*, it allowed the filing of certain suits if plaintiff had a lawyer represent him).) Presumably, the lawyer would be the best judge of the merits of the suit, and the lawyer's conduct is bound by "prescribed rules of ethics and professional conduct." (*Id.* at p. 59.) This is precisely the type of injunction the trial court should and could have issued.

Delaware courts would have ordered similar injunctive relief, rather than a receivership. See, *e.g. Hall*, *supra* at 255-56. The trial court's failure to apply a "lesser" remedy like this is an abuse of discretion. Even where a receivership over an LLC is granted, it is narrowly tailored to address only the specific issue giving rise to the need for receivership. (*Jagodzinski v. Silicon Valley Innovation Co.*, *supra* at 2012 WL 593613, at p. *3 (court appointed a receiver to deal with a single issue, making the corporation cure its contempt under prior orders of the court relating to production of documents, but the receiver was not given general authority to run the business going forward and the receivership was to be terminated as soon as the documents were produced).)

F. Misuse of Arbitration

As noted above, the court admitted it had not read the underlying complaint, and did not really understand the numerous claims and issues in the court-ordered arbitration. The parties had contracted to have their dispute resolved by arbitration. Once an arbitration agreement is found to be valid, as this one was, a court is obligated to respect that agreement, regardless of its distaste for the duration of the arbitration. (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 351 [136 Cal.Rptr.3d 832] (court pays substantial deference to arbitrator's determination of his own authority).) Here, the court below failed to afford the arbitration any deference, apparently out of frustration with the pace of the arbitration.

G. Leong's Remedy Was Before the FCC, Not the Superior Court.

Leong has long asserted that he is a co-controller of the FCC licenses, not just a 49% interest holder in the LLC's. APP-1469 at ¶ 79. Leong's remedy, if he believed Havens needed to be removed to protect the licenses was to proceed before the FCC because only the FCC can decide who controls its licenses, a fact reflected by the need for the Receivership Order to instruct the Receiver to apply to the FCC for transfer of control. 47 U.S.C. § 301 *et. seq.*[77] Leong should have petitioned the FCC to transfer control of the licenses to him. He did not do so.

[77] In particular 47 U.S.C. § 310(d) provides: "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and

The reason Leong should have petitioned the FDCC is his claims in state court are preempted under the "market entry" provisions of the Communications Act, 47 U.S.C. § 332(c)(3)(A).[78] Under the Communications Act, the FCC has exclusive jurisdiction over those claims.[79] Also, because the preemption issues relate to the subject matter jurisdiction of the trial court, they could be raised for the first time here. *Detomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 520 [235 Cal.Rptr. 292].

The reason Leong's claims are preempted by the market entry provisions of the Communications Act is they focus upon Leong's contention that he has at least equal co-control of the entities with Havens. APP-1469 at ¶ 79. That, of course, is market entry, because if he is correct, Leong would move from being a minority owner to a controlling or co-

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necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

[78] For illustrative purposes only (citation of the unpublished opinion for a point of law being prohibited by California Rule of Court 8.1115), Division One of this Court found similar claims by Havens in a case related to the disputes pending before ALJ Sippel to be preempted by the Communications Act. *Havens v. Mobex Network Services, LLC* (Cal.App. 2009) 2009 WL 3067046. Leong was not a party to that case. but Mobex was the predecessor of the adverse party in the administrative proceeding before ALJ Sippel.

[79] These issues were raised below. APP-1990 (lines 8-10); RT 8/11/15 at 25:17-19.

controlling owner of the license-holding entities. Thus, that claim is preempted, as is the trial court's decision to remove Havens from control of the entities.[80] Indeed, by requiring Havens to relinquish control to the Receiver before the FCC had approved any transfer of control, the trial court directly infringed upon the exclusive jurisdiction of the FCC. This error was compounded by the gag order placed in the Receivership Order which precluded Havens from even communicating with the FCC about assets in which he holds a substantial interest, and about control of those assets for which the FCC has the final say, not the California courts.

H. The Trial Court Deprived Havens of Due Process

The Due Process Clause of the Fourteenth Amendment to the Constitution requires state courts (and other state tribunals) to ensure citizens both notice and a hearing before certain personal and property rights may be terminated or lost. (*Goldberg v. Kelly* (1969) 397 U.S. 254 [90 S.Ct. 1011, 25 L.Ed.2d 287]; see, also, *Shaffer v. Heitner* (1977) 433 U.S. 186, 199 [97 S.Ct. 2569, 53 L.Ed.2d 683] (requiring states to determine whether a receiver's exercise of jurisdiction of a person's property is consistent with due process).) As explained by the court in *Fuentes v. Shevin* (1972) 407 U.S. 67, 81 [92 S.Ct. 1983, 32 L.Ed.2d 556]:

> The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that

[80] Leong's claim to a co-controlling interest is illegal because he failed to present his control claim to the FCC for its review and approval under 47 U.S.C. §310(d).

> is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference

While there was notice and a hearing here, an examination of the proceedings demonstrates the practical reality that due process was not afforded Havens. Not only did the trial court order a receivership at a future date in order to coerce the parties into settling the underlying dispute, but it also stated on the record its blanket refusal to consider any additional evidence or argument between the date of the hearing and the future date of the order, even though the receivership was ostensibly based upon the risk of "imminent" adverse activity by the FCC, thus there was a real possibility that the circumstances would change.

1. Havens Was Deprived of Due Process by the Lack of an Evidentiary Hearing.

The fundamental problem here is the trial court made up its mind at the first hearing before even reading all the papers submitted. Then, while there were further hearings and additional briefing, nothing happened to even suggest that further deliberation and consideration took place. Thus, the circumstances of the initial hearing are relevant.

Havens had approximately 24 hours' notice of the initial hearing on May 19, 2015.[81] At that hearing, on a Tuesday, the court gave Havens until

[81] APP-S1.

that Friday to submit papers in opposition, and then set a further hearing the following Tuesday. On Tuesday, May 26, 2015, the court announced:

> THE COURT: All right. I still have to read the Havens declaration, which is at least a half an inch worth of paper. My inclination, quite frankly, is to grant the receivership based on everything that I've read. But I'm going to take it under submission. I did not see a proposed order here.
>
> MR. KIRSCH: There was a proposed order, Your Honor, that you had last week.
>
> THE COURT: Was it on the judicial council form?
>
> MR. KIRSCH: No, it was on a --
>
> THE COURT: I did look at it; it was utterly inadequate. Why don't you put together a judicial council form. Have a conversation with Mr. Downs and Mr. Norris about things like engaging counsel to pursue the judgment in Nevada, that sort of thing. And -- but I'm going to read everything quite -- if my sort of tentative direction changes, I'll let you know. But I'm tentatively inclined to grant the receivership.[82]

Following this hearing, there was additional briefing by both sides, but never any attempt by the trial court to resolve the factual issues in dispute by conducting an evidentiary hearing, which Havens requested and which Delaware law requires.[83] As the trial court's comments, both before and after August 11 vividly illustrate, the controlling factor for the court was

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[82] RT Transcript of Hearing Held May 26, 2015 at 43-44.

[83] APP-1504.

the arbitration, supervised by the arbitrator, had simply taken too long, and something had to be done to force the parties to settle the case. Coercion of settlement is the antithesis of due process.

2. The Trial Court Deprived Havens of Property Without Due Process of Law

Havens' right to control the business future of the entities, their strategy and decisions is a property right. *See, Clute v. Superior Court* (1908) 155 Cal. 15, 19 [99 P. 362] [Order requiring surrender of control of business is mandatory injunction]. By not following the procedures required by Delaware law, and by placing docket control ahead of the substantive rights of Havens, the trial court further deprived Havens of property without due process of law.

Indeed, what the court did by stating its initial inclination on the record close to six months before it eventually entered the receivership order, was to permit Leong through his attorneys to act to harm the credibility of Havens and the entities in the marketplace. In particular, Leong's Washington attorney made a series of gratuitously unnecessary and harmful statements to the FCC which harmed the entities.[84]

This isn't simply a case of a trial court acting erroneously. This is a trial court that, in its abuse of discretion, trampled all over Havens' constitutional rights.

[84] APP-655-58 (Leong attorney correspondence with the FCC); APP-2798-99 ¶¶ 2 and 3 (discussion of marketplace consequences).

VIII. CONCLUSION

A solvent company was placed into receivership based on a highly theoretical risk of future harm. Rather than being "imminent," that risk of harm never came to fruition in the seven months that passed between the Sippel Order and the Superior Court's Receivership Order.

Why did this happen? It happened because the court below was offended at the duration of the AAA arbitration between the parties. The duration of the arbitration, however, is not something for the court's concern. It is between the parties and the arbitrator. Having previously compelled arbitration, the Superior Court's only role in the arbitration is to confirm or reject a future arbitration award. It is not permitted to interfere in the arbitration while it proceeds, nor is it permitted to punish the party it subjectively concluded was more responsible for the duration of the arbitration.

The Superior Court abused its discretion and acted well beyond its jurisdiction. The receivership never should have occurred.

Appellant Warren Havens respectfully requests that the Court reverse the Order Appointing Receiver entered by the Superior Court.

DATED: August 19, 2016

BULLIVANT HOUSER BAILEY PC

By */s/ Andrew B. Downs*
Andrew B. Downs
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Attorneys for Defendant-Appellant
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CERTIFICATION REGARDING LENGTH OF BRIEF

I certify that this brief was prepared in proportionally spaced Times New Roman 14 point typeface and Microsoft Word states that it contains 13,097 words exclusive of the Cover, Certifications and Tables of Contents and Authorities.

DATED: August 19, 2016

BULLIVANT HOUSER BAILEY PC

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PROOF OF SERVICE
Arnold Leong v. Warren Havens, et al.
California Court of Appeal, First Appellate District, Division 5,
No. A147027
Alameda Superior Court No. 2002-070640

I am employed in the City and County of San Francisco by the law firm of Bullivant Houser Bailey ("the business"), 235 Pine Street, Suite 1500, San Francisco, CA 94104. I am over the age of eighteen (18) and not a party to this action. On August 19, 2016, I served the document entitled:

APPELLANT'S OPENING BRIEF

upon the following parties:

HONORABLE FRANK ROESCH
Judge, Alameda Superior Court
1221 Oak Street, Department 24
Oakland, CA 94612

(X) **BY MAIL (CCP §1013(a))**: I am readily familiar with the ordinary practice of the business with respect to the collection and processing of correspondence for mailing with the United States Postal Service. I placed a true and correct copy of the above-titled document in an envelope addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed it for collection and mailing by the United States Postal Service in accordance with the ordinary practice of the business. Correspondence so placed is ordinarily deposited by the business with the United States Postal Service on the same day.

( ) **BY ELECTRONIC TRANSFER**: I caused all of the pages of the above-entitled document to be sent to the recipient indicated via email at the respective email addresses. This document was transmitted by email and transmission reported without error.

( ) **BY FACSIMILE TRANSMISSION (CCP §1013(e), CRC 2.306)**: I transmitted the document by facsimile transmission by placing it in a facsimile machine (telephone number 415-352-2701) and transmitting it to the facsimile machine telephone number listed above. A transmission report was properly issued by the transmitting facsimile machine. The transmission was reported as complete and without error. A true and correct copy of the transmission report is attached hereto.

( ) **BY OVERNIGHT DELIVERY (CCP §1013(c))**: I am readily familiar with the ordinary practice of the business with respect to the collection and processing of correspondence for mailing by Express Mail and other carriers providing for overnight delivery. I placed a true and correct copy of the above-titled document in an envelope addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed it for collection and mailing by Express

Mail or other carrier for overnight delivery in accordance with the ordinary practice of the business. Correspondence so placed is ordinarily deposited by the business with Express Mail or other carrier on the same day.

( ) **BY PERSONAL SERVICE UPON AN ATTORNEY (CCP §1011(a))**: I placed a true and correct copy of the above-titled document in a sealed envelope addressed as indicated above. I delivered said envelopes by hand to a receptionist or a person authorized to accept same at the address on the envelope, or, if no person was present, by leaving the envelope in a conspicuous place in the office between the hours of nine in the morning and five in the afternoon.

( ) **BY HAND**: Pursuant to Code of Civil Procedure §1011, I directed said envelope to the party so designated on the service list to be delivered by courier this date. A proof of service by hand executed by the courier shall be filed/lodged with the court under separate cover.

( ) **BY PERSONAL SERVICE UPON A PARTY (CCP §1011(b))**: I placed a true and correct copy of the above-titled document in a sealed envelope addressed as indicated above. I delivered each envelope by hand to a person of not less than eighteen (18) years of age at the address listed on the envelope, between the hours of eight in the morning and six in the evening.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on August 19, 2016, at San Francisco, California.

ROBERTA C. BEACH

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